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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-382

MARK M. STREETER,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Mark M. Streeter, respectfully prays that a Writ of Certiorari to review the opinion, judgment, and denial of rehearing of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 16, 1978, and on August 9, 1978.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reproduced as Appendix A.

The judgment of the United States Court of Appeals for the Fifth Circuit is reproduced as Appendix B. The denial of rehearing by the United States Court of Appeals for the Fifth Circuit is reproduced as Appendix C.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on June 16, 1978. The denial of the Petition for Rehearing by the United States Court of Appeals for the Fifth Circuit was entered on August 9, 1978. This Petition for a Writ of Certiorari is timely filed within thirty days of the date of the denial of the Petition for Rehearing by the United States Court of Appeals for the Fifth Circuit. Jurisdiction is invoked pursuant to the provisions of 28 U.S.C., §1254 (1) and Rule 19 (1) (b) of the Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

One of the questions presented for review is whether

or not the charges for which Mark M. Streeter was tried caused the Petitioner, Streeter, to be placed in double jeopardy. The other question presented for review on behalf of the Petitioner, Mark M. Streeter, is whether or not a conversation that Mark M. Streeter had with the unindicted co-conspirator, Robert David Fleming, after the termination of the alleged conspiracy, wherein Streeter discussed with Fleming what his statement to the police officers had been was sufficient evidence to establish that Mark M. Streeter had knowingly entered an existing conspiracy prior to the time of the termination of said alleged conspiracy.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the Constitution of the United States provides in relevant part:

> "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.....nor be deprived of life, liberty, or property, without due process of law....."

STATEMENT OF THE CASE

Petitioner, Mark M. Streeter, was indicted on or about the 9th day of February, 1977, along with Vance Dyar, Richard B. Barker, Clement J. DeMatto, Gary L. Pagels, Peter S. Penrose, and Neal M. Perks for conspiracy to import marijuana and conspiracy to possess marijuana with the intent to distribute by a Grand Jury in the United States District Court for the Middle District of Florida, Jacksonville Division, said case being number 77-45-Cr-J-T in the said District Court. The Court of first instance had jurisdiction by virtue of the fact that the Petitioner and others were charged with violation of Title 21, Sections 952 (a), 963, 841 (a) (1), and 846 of the United States Code.

Trial was begun on or about the 8th day of June, 1977, and was completed on or about the 14th day of June, 1977. Only Petitioner, Mark M. Streeter, Vance Dyar, and Clement J. DeMatto were tried at that time.

The jury returned a verdict of guilty on both counts as to the Petitioner and the other two co-defendants. On July 25th, 1977, the Court adjudged the Petitioner, Mark M. Streeter, guilty of the two counts of the indictment and then proceeded to sentence the Petitioner, stating that the sentence was to be for both counts one and two of the indictment and that the sentences were concurrent to each other.

Feeling aggrieved at this decision of the United States District Court, the Petitioner appealed to the United States Court of Appeals for the Fifth Circuit.

The conviction of Mark M. Streeter was affirmed by the United States Court of Appeals for the Fifth Circuit on June 16, 1978. A Petition for Rehearing was filed and the Petition was denied by the Court of Appeals on August 9, 1978.

The facts of the case, as established by the proof of the Government, are that David Fleming received a call from Vance Dyar around the 10th or 11th of

August, 1975. That after receiving the phone call from Vance Dyar, Fleming left Orlando, Florida, and went to Memphis, Tennessee, where he was met at the airport by Vance Dyar and Mark M. Streeter. That the three of them then went to a motel, the kind of motel being unknown to David Fleming or not remembered by him, where Fleming met with Gary L. Pagels, an attorney, and Vance Dyar, in a motel room.

The Government's evidence further showed that Fleming, Dyar, and Pagels discussed flying "Rock Groups" to certain Central and South American countries and also the prospects of flying people down on hunting expeditions. The evidence by the Government further showed that, at some point, the conversation turned to making a "marijunana run" to some place in Central or South America, in order to raise the money that would be necessary to promote the "Rock Groups" and carry out the hunting

expeditions.

The evidence from Fleming was to the effect that Mark M. Streeter entered and left the room several times while he was having the conversation with Pagels and Dyar. However, even though Fleming stated that he assumed that Mark M. Streeter was aware that the conversation had turned to the importation of marijuana, he could not give any specific evidence as to what was said about marijuana by any of the parties in the presence of Mark M. Streeter, nor could he give any single instance as to any statement made by Mark M. Streeter about the importation of marijuana. Mr. Fleming testified that he could not tell with any certainty at which point during any of the conversation that Mark Streeter returned to the room. Finally, on cross-examination, Fleming admitted that it would be an assumption on his part that Mark Streeter would have been present at a time when the illegal importation was discussed.

Further, the evidence from Fleming showed that

Fleming and a man named Perks went to Hankins Air Service in Jackson, Mississippi, on August 15, 1975, to lease a plane from Hankins. That Gary L. Pagels, the attorney, joined them and paid Hankins $7500 for the lease of the plane for one month. That Gary L. Pagels negotiated the lease with Hankins and executed same in the name of Memphis Productions, Limited. The Government's proof later showed that the attorney, Gary L. Pagels, signed Memphis Productions, Limited to the lease, as Lessee, by affixing the name Mark M. Streeter to the lease.

Also, the Government's proof showed that Fleming filed phony flight plans to the Bahamas and departed from Orlando, Florida, for Colombia, South America. The Government's proof further showed that Fleming landed in Colombia, South America, and was met by a man named Barker, who assisted him in having what appeared to be marijuana loaded on the plane and in getting the wing of the airplane repaired which Fleming

had damaged while landing.

The Government's proof then shows that Fleming returned to the United States and landed at Keystone Heights, Florida, because he did not have enough fuel to make it to the Pensacola area which is where Pagels had directed him to land. The proof seemed to show that Fleming landed in Keystone Heights, Florida, on or about August 26, 1975.

David Fleming further testified that after he had been arrested and after the plane and its contents had been confiscated, Mark M. Streeter came to Orlando on or about August 28, or August 29, 1975, to discuss with him the possibility of getting Fleming an attorney and to discuss with him the story that Fleming had told the authorities about the plane and what had happened.

REASONS FOR GRANTING THE WRIT

The Government has attempted in its indictment to charge the Petitioner, Streeter, with two separate

offenses, when, in fact, both alleged offenses have arisen from the "same transaction," "same offense," or "same conspiracy." That since both charges arise from the exact "same offense," "same transaction," or "same conspiracy," this amounts to an effort on the part of the Government to place the Petitioner, Streeter, in double jeopardy, which is in direct violation of the Fifth Amendment to the United States Constitution.

The Court of Appeals for the Fifth Circuit has held as late as 1976 in the case of United States v. Houltin, 525 F.2d 943, that defendants may be charged with two separate offenses and convicted of each of them in a situation such as this. However, it is respectfully urged by the Petitioner that this is neither a realistic nor constitutional position for the Court to take on this issue.

The United States Court of Appeals for the Ninth Circuit held in the case of United States v. Moore,

522 F.2d 1068 (1975), that the Government may not prosecute for several conspiracies when, in truth, there was only one.

The United States Court of Appeals for the First Circuit is in accord with the Court of Appeals for the Ninth Circuit, as is evinced by the case of United States v. Honneus, 508 F.2d 566 (1974), wherein the Court of Appeals for the First Circuit cited the language of the Supreme Court of the United States in Braverman v. United States, 317 U.S. 49, 53 (1949), wherein the Supreme Court said:

> "Whether the object of a single agreement is to commit one or more crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one."

The United States Court of Appeals for the First Circuit pointed out that in Braverman, all counts violated only a single conspiracy statute. However, the Court of Appeals for the First Circuit in noting

that in the Honneus case, each conspiracy count was brought under a different federal conspiracy statute, nevertheless, held that these factors could not turn the one criminal agreement into a trilogy of crimes. In so holding, the Court of Appeals for the First Circuit stated:

> "While undoubtedly Congress meant to attack the drug trade with severity....., we doubt that it meant to authorize, or could authorize a Court to impose three punishments for one conspiracy. Congress may treat different aspects of the same conduct as separate crimes only if there is a meaningful distinction between the elements constituting each offense..... We hold that charging a single illict agreement under several statutes does not make it more than one conspiracy."

The Court of Appeals for the First Circuit held that there was no error in submitting all three counts to the jury but further held that only one sentence could be imposed and the Court vacated the separate concurrent sentences and remanded for sentencing upon any of the three counts to the District Court, with the instruction that surplus counts were to be

dismissed.

On this same issue, the United States Court of Appeals for the Sixth Circuit seems to be in accord with the Courts of Appeals for the First and Ninth Circuits. In the case of United States v. Adcock, 487 F.2d 637 (1973), the Court of Appeals for the Sixth Circuit stated as follows:

> "We hold that the evidence does not support appellants' sentences on both conspiracy counts. It is clear that when a single agreement is entered, the one agreement cannot be taken to be several conspiracies because it envisages the violation of several statutes rather than one.....And here the evidence demonstrates that only a single conspiracy existed, however diverse its objects."

However, the United States Court of Appeals for the Sixth Circuit found that the District Court did not abuse its discretion in the sentences it imposed stating as follows:

> "We have previously held that the exercise of that discretion will not be disturbed on appeal, except upon a plain showing of gross abuse..... We observe, nevertheless that under Rule 35 of the Federal Rules of Criminal Procedure, 18 U.S.C.A. §35(Supp. 1970), appellants have a

hundred and twenty days from the date of the mandate from this Court in which to move for a reduction of sentence. The District Court may decide, in light of our direction for vacation of the sentence on one of the conspiracy counts and in light of appellant's good record prior to the events that are the subject of this appeal and their asserted self-rehabilitation while on bail after conviction, to exercise its discretion to reduce the sentences previously imposed. In accordance with the foregoing, the judgment of the District Court is vacated to permit resentencing on only one of the two conspiracy counts."

In the case at bar, it is crystal clear that there was only a single agreement or conspiracy, and there was certainly no meaningful distinction between the alleged elements constituting each offense. Moreover, the fact that Streeter received two concurrent sentences on the two counts does not prevent double jeopardy from applying. It is respectfully submitted that the two jury verdicts of guilty and the two counts of the indictment upon which those verdicts were based, have an effect on the amount of time the Trial Court gives on each conviction even though the Court runs the sentences concurrently. Further, as pointed out

by the Sixth Circuit in the Adcock case, cited supra, if the sentences are vacated with the instruction to the District Court to sentence only on one conspiracy count, then the Petitioner would have the advantage of moving for a reduction of sentence and dem ו-strating to the District Court his good record prior to the events that are the subject of this case and his self-rehabilitation while on bail both before and after conviction.

Aside from the importance of this case to the Petitioner, Mark M. Streeter, this Court should review this case on this particular issue, in order that the matter may be decided, once and for all, and thereby prevent further confusion and remove the conflict that presently exists among the Courts of Appeals for the various Circuits.

As to the question presented concerning the insufficiency of the evidence, it is respectfully submitted that the Petitioner's conviction in the case at bar violates that portion of the Fifth Amendment to the

United States Constitution that prohibits a person from being deprived of life, liberty, or property, without due process of law.

The United States Court of Appeals for the Fifth Circuit, on page 4933 of its opinion in this case, determined that the evidence against Streeter was insufficient except for the trip that Streeter made to Orlando, Florida, to discuss with Fleming the alibi that Fleming had given to the police. It is undisputed that this trip to Florida by Streeter was made after the pilot, Fleming, had been arrested and after the law enforcement officers had seized the plane and confiscated all of the marijuana. Therefore, it is undisputed that the conversation between Streeter and the pilot, Fleming, occurred after the conspiracy had terminated, since none of the other alleged conspirators could any longer engage in the alleged purposes of the conspiracy because of the fact that the cargo of the plane, i.e., the marijuana had been

confiscated and was being held by the authorities. Since the conspiracy had terminated by the police action, there was no proof by the testimony that Streeter went to Orlando to talk with Fleming that the Petitioner, Mark M. Streeter, was part of the alleged conspiracy. The record is completely devoid of any evidence that would show that Mark M. Streeter ever knowingly became a member of the alleged conspiracy at the time that the conspiracy was in existence. In fact, the United States Court of Appeals for the Fifth Circuit held in the case of United States v. Killian, 524 F.2d 1268 (1975), that statements which were made by an alleged conspirator to Federal Agents after the arrest of other co-conspirators were not legally admissible in evidence against the latter since the conspiracy had terminated with their arrest. From reading the cases in the Fifth Circuit, it appeared that that Court had always recognized what was admissible evidence to prove the entering into of a conspiracy by a person or the furtherance of a conspiracy

by a person. However, as the decision relates to Petitioner, Mark M. Streeter, the Court of Appeals for the Fifth Circuit seems to have departed from the logic contained in many of its other decisions.

Even assuming that Petitioner knew of the existence of the conspiracy, the evidence does not show when he became aware of it. The only evidence that would infer that he knew of it was when he met Fleming in Orlando after the conspiracy had terminated. There is not one iota of proof in the record that would let a jury or anyone else infer that Streeter knew of the conspiracy until his good friend and attorney, Gary Pagels, sent him to Orlando after the conspiracy was over. So also, the evidence that shows his interest exceeded that of an uninvolved bystander and that he had a vital stake in it occurred after the conspiracy was over and would be consistent with showing that he became an accessory after the fact by assisting his attorney friend in covering up any illegal acts

that had occurred in a conspiracy that no longer existed.

There is just no evidence in the record that would prove Petitioner knowingly became a member of a conspiracy during the time of its existence. To sustain his conviction, the Court has had to go beyond the existence of the conspiracy to find evidence to support an inference by the jury that Streeter knowingly entered a conspiracy prior to the time it terminated. In taking these steps to find sufficient evidence to support the jury verdict in this conspiracy case, the Court's decision becomes analagous to a decision to allow into evidence an inference based upon an inference or inferences. The decision by the Court of Appeals for the Fifth Circuit has set a dangerous precedent by allowing the Government to go beyond the duration of the alleged conspiracy to grasp enough evidence to feebly give assistance to its contention that Streeter knowingly entered the

conspiracy at the time it was in existence. It is respectfully submitted that Streeter's conviction, which is based upon this type of evidence or lack of evidence, is in direct violation of the due process clause of the Fifth Amendment to the United States Constitution.

CONCLUSION

For the reasons stated hereinabove, this Court should issue a Writ of Certiorari to review and then reverse the opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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UNITED STATES V. DYAR

United States of America
Plaintiff-Appellee,

v.

Vance Dyar, Mark M. Streeter, and
Clement J. DeMatto,
Defendants-Appellants.

No. 77-5481

United States Court of Appeals
Fifth Circuit

June 16, 1978

Defendants were convicted before the United States Court for the Middle District of Florida, at Jacksonville, George C. Young, Chief Judge, of conspiracy to import marijuana and conspiracy to possess with intent to distribute marijuana, and they appealed. The Court of Appeals, Coleman, Circuit Judge, held that: (1) evidence was insufficient to adequately connect one defendant, whose conviction was supported only by suspicion and a ten-minute association with actual conspirators, with conspiracy; (2) evidence

was sufficient to support conviction of another defendant; (3) indictment was not duplicitous, and (4) two defendants lacked standing to contest legality of search of aircraft which allegedly led to discovery of government witness's identity.

Affirmed in part and reversed in part and remanded.

1. Conspiracy 47(12)

Evidence was insufficient to adequately connect one defendant, whose conviction was supported only by suspicion and a ten-minute association with the actual conspirators, with conspiracy to import marijuana and to possess with intent to distribute marijuana. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 406, 1013, 21 U.S.C.A. §§ 846, 963.

2. Conspiracy 47(1)

Before being entitled to conviction, Government must prove by evidence beyond a reasonable doubt not only that conspiracy did in fact exist, but also

that defendant knew of it and with that knowledge agreed to take part in it; suspicion is not enough and guilty participation in conspiracy may not be inferred from mere association.

3. Conspiracy 47(12)

Evidence, from which reasonably minded jury could infer that defendant most assuredly knew of conspiracy, that his interest in it exceeded that of uninvolved bystander, and that he had vital stake in concealing it, was sufficient to support conviction of defendant, who was in and out of motel room during discussions about marijuana run and who, after codefendant's arrest, discussed with such codefendant alibi given to police, of conspiracy to import and possess with intent to distribute marijuana. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 406, 1013, 21 U.S.C.A. §§ 846, 963.

4. Criminal Law 200(6)

Indictment charging defendants with conspiracy

to possess with intent to distribute and conspiracy to import marijuana was not duplicitous and thus multiple punishments imposed were not in derogation of defendants' constitutional guarantee against double jeopardy; moreover, defendants received concurrent sentences on the two counts. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 406, 1013, 21 U.S.C.A. §§ 846, 963.

5. Searches and Seizures 7(26)

Decisive factor in challenging search is whether complaining individual had reasonable expectation of privacy in premises searched or things searched; generally, a defendant will satisfy standing requirements if he has proprietary or possessory interest in place searched or objects seized adequate to give rise to reasonable expectation of privacy, if he was on premises at time of contested search and seizure, or if he is charged with offense that includes as an essential element possession of seized evidence.

6. Searches and Seizures 7(26)

Traditional or common-law theories of property rights do not automatically confer standing of challenge a search; property rights in absence of reasonable expectations of privacy in property cannot support a Fourth Amendment claim but, rather, ownership or leasehold interest must be accompanied by cognizable privacy interest in place of thing searched. U.S.C.A. Const. Amend. 4.

7. Searches and Seizures 7(26)

Even if defendants had leasehold interest in searched aircraft sufficient to create traditional property right, when they gave possession to pilot they abandoned any expectation of personal privacy in aircraft, and thus lacked standing to contest legality of search which resulted in discovery of identity of pilot, who subsequently testified for Government against defendants. U.S.C.A. Const. Amend. 4.

8. Searches and Seizures 7(26)

Defendants, who not only failed to satisfy rea-

sonable expectation of privacy requirements for Fourth Amendment test of standing, but were not victims of aircraft search or ones against whom search was directed, were merely persons claiming prejudice through introduction of damaging evidence gathered as consequence of search directed at someone else, and thus could not assert Fourth Amendment rights of pilot, whose identity was learned through search of aircraft and who subsequently testified for Government against defendants. U.S.C. A. Const. Amend. 4.

Appeals from the United States District Court for the Middle District of Florida.

Before TUTTLE, COLEMAN, and CLARK, Circuit Judges.

COLEMAN, Circuit Judge.

Clement J. DeMatto, Mark M. Streeter, and Vance Dyar appeal their convictions of conspiracy to import

marijuana, 21 U.S.C., § 963 (Supp., 1978), and of conspiracy to possess with intent to distribute marijuana, 21 U.S.C., § 846 (Supp., 1978).

DeMatto challenges the sufficiency of the evidence to support his conviction. The challenge is well taken. We reverse DeMatto's conviction and remand with directions to enter a judgment of acquittal.

Streeter questions the sufficiency of the evidence and, as does Dyar, contests the denial of standing for the suppression of certain testimony as being the fruit of an illegal search. Finally, Streeter and Dyar complain that the indictment charging both conspiracy to possess and to import marijuana was both duplicitous and amounted to double jeopardy. The convictions of Streeter and Dyar are affirmed.

On August 11, 1975, Dyar phoned Robert David Fleming, a government witness and an unindicted co-conspirator, to inquire if Fleming would accept a pilot's position with Memphis Productions, allegedly

an organization of rock music promoters. The next day Fleming flew to Memphis to see about the job proposition. Dyar and Streeter met Fleming at the Memphis airport and took him to Memphis Quality Inn East.

Upon arrival at the motel, Fleming talked to Gary Pagels and Dyar about the feasibility of transporting rock music groups and hunting expeditions to various destinations, inside and outside the Country. Later on, the subject of marijuana importation came up when Dyar proposed to furnish the necessary cash outlay for the air charter business from profits to be realized from a marijuana run to Colombia, South America. After Fleming had agreed to pilot the aircraft on which the marijuana would be imported, he met DeMatto. DeMatto was introduced as the man with the rock group connections and as the street distributor of the grass but made no comment in response to that description. Following the introduction

and after some small talk, DeMatto asked Fleming if he was "going to help out with this thing" (Emphasis added). Fleming responded affirmatively. DeMatto "appeared to be pleased" and said that he would be back in touch with Fleming, but was never again in contact with him.

During the marijuana discussions, Streeter was in and out of the motel room.

Later that day, Dyar, Pagels, Neal Perks, and Fleming flew from Memphis to Hamilton, Alabama, to inspect the aircraft which Dyar planned to use in the marijuana run. Fleming concluded that the plane was not airworthy, but he and Perks flew the plane to an airport south of Memphis, where it was impounded by the F.A.A.

Left without a plane, Dyar, Pagels, and Fleming went to Jackson, Mississippi, on August 15 to procure a plane from Hankins Aviation. Pagels and Fleming negotiated the lease of an aircraft for one

month. Pagels paid the entire rental price and executed the lease in the name of Memphis Productions, signing in the name of Mark M. Streeter, but Streeter was not there and had not participated in the negotiations.

That evening, Perks and Fleming flew the rented plane to Bekin Airport in Mobile, Alabama, for a rendezvous with Pagels and Dyar. On the next morning, the plane was refueled and some furniture was removed to increase cargo load capacity. All expenses incurred at Bekin were paid in cash by Dyar.

After the modifications were completed, Fleming, Dyar, and Perks took off for Colombia, South America, via Haiti. Radio difficulties developed shortly after take-off and forced Fleming to land at Orlando. When it was discovered that the repairs would take several days, the trip to Colombia was postponed, and Dyar and Perks left the Orlando area.

On Wednesday, August 21, Fleming phoned Pagels

to inform him that the radio malfunction had been corrected and to reschedule the flight for Saturday. Again on Friday, Fleming called Pagels. Pagels told him that Perks would join him in Orlando on Saturday and that Dyar would meet them at their destination.

Saturday morning, Fleming and Perks filed a phony flight plan for the Bahamas but flew to Colombia, South America, to pick up a load of marijuana. Upon their arrival, they were greeted by Rick Barker who claimed to be in charge of the Colombian end of the operation.

On Sunday morning, Fleming and Perks departed Colombia and arrived stateside that evening. As instructed by Barker, they landed the plane at Keystone Heights airport, in Florida, where they left it. They hitched a ride to Gainesville, Florida, where they parted company.

Tuesday morning, Fleming's wife phoned him at

work to notify him that officials of the Florida Law Enforcement Agency were en route to arrest him. Fleming immediately called Pagels to advise him that the cops were on their way to arrest him and to tell Pagels the story he would relate to the police. Fleming was arrested and charged with possession of a controlled substance. Fleming posted bail and was released from jail on Wednesday.

On Thursday, Fleming called Pagels to ascertain what steps Memphis Productions would take next.

It was at this point that Streeter reenters the picture. On Friday, Streeter flew to Orlando to see Fleming. Streeter asked Fleming what story had been given to the police, leaving Fleming with the impression that Streeter wanted to ensure the stories were straight and together. Fleming replied that he had told the police that someone from Memphis Productions had loaned the aircraft to two persons for the weekend, that he had given them instructions on

flying the plane, had aided them in filing a flight plan, and that he had not since seen or heard from them. Streeter stated that they would abide by that story.

In September of 1976, over one year later, Fleming agreed to testify for the government in exchange for immunity.

On February 9, 1977, a joint indictment was returned against DeMatto, Dyar, and Streeter, along with four other persons, charging them with the offenses of conspiracy to import marijuana and conspiracy to possess marijuana with the intent to distribute. They were tried and convicted on both counts.

I

Sufficiency of the Evidence

a. Clement DeMatto

[1] DeMatto claims that because the evidence was insufficient to convict him the District Court erred in the denial of his motion for judgment of acquittal. As to several individuals a conspiracy no

doubt existed. Did the proof adequately connect DeMatto with that conspiracy? As indicated at the outset, we think not.

Fleming, the pilot, was the sole witness against DeMatto. According to his testimony DeMatto came by the meeting at the Quality Inn East but he was there for less than ten minutes after the other participants had been discussing rock groups-marijuana transportation for about an hour and a half. Obviously, DeMatto could not have known of the marijuana conspiracy because it had just been agreed upon.

On direct, cross, and re-direct examination, Fleming gave four versions of DeMatto's "introduction" to those present.

His first version was that:

> "He was introducted as Clem and that Clem had connections with a lot of these rock groups and had connections with respect to moving this marijuana after it reached the United States in distributing it."

He was then asked what DeMatto had said to him

after the introduction and he responded:

> "Other than some general same talk, the main thing he said was 'are you going to help us out on this thing?' and I said 'yes'."

His second version of what happened was:

> "General all around introduction, few familiarities—just general small talk for a few minutes and then finished up with the words to the effect 'well, are you going to help us out on this thing?' and I agreed affirmatively that I would and he said, 'well, good. I will be talking to you later on', and he left."

The third version was:

> " I was told [T]hat his name was Clem and that Clem was the man who was going to help distribute this material when it was brought back to this country."

Fleming then proceeded to say that nothing else "significant" was said that he could recall, that DeMatto did not mention marijuana in connection with helping out with "this thing".

Ultimately, Fleming recited the fourth version:

> "At the time Mr. DeMatto was introduced to me it was stated that this was Clem and Clem has a connection with a lot of these rock groups and also has some friends who are going to be in position to distribute this marijuana when we get it back."

After the brief visit to the motel room, DeMatto totally disappears from the case. Fleming testified that he never saw him again, never talked with him on the telephone, that he had no further contact with DeMatto at all.

In conclusion, Fleming was asked if "Clem" ever "told you he was going to do that (participate in the marijuana operation) and he responded, "No, sir".

The government argues that DeMatto's conviction should stand because he remained silent when he was introduced as one who would help with the marijuana distribution and because he asked Fleming if he was going to help with "this thing".

On the question of silence, it must first be noted that according to the first version of the introduction it was merely said that DeMatto had "connections", not that he had agreed to participate in the conspiracy. According to the second version there was "general small talk for a few minutes", no mention of mari-

juana. The third version was that Clem "was the man who was going to help distribute this material when it was brought back to this country". This, however, was not an accusing statement with reference to past misconduct; it was a prediction, which, obviously, DeMatto had not agreed to. The fourth version was that "Clem had connections with a lot of those rock groups and had friends who are going to be in position to distribute this marijuana" when the actors got it back. Finally, Fleming admitted that DeMatto had never told him that he was going to participate in the marijuana operations.

[2] It is well established in the law of conspiracy that before being entitled to a conviction the government must prove by the evidence beyond a reasonable doubt not only that a conspiracy did, in fact exist, (as existed here among several of the actors) but also that the defendant knew it and, with that knowledge, agreed to take part in it. Suspicion is

not enough and guilty participation in a conspiracy may not be inferred from mere association.

Upon a painstaking review of Fleming's testimony, undertaken in light of the government's burden of proof, but construing the evidence in the light most favorable to the verdict, we are left with the firm conviction that the prosecution wholly failed to carry its burden. It failed to prove that when he entered the room DeMatto knew of the conspiracy which had been hatched by the other participants within the past thirty minutes. It certainly failed to prove that DeMatto agreed to participate in it.

Fleming did swear that DeMatto asked him if he was going to help them with "this thing"—no elaboration as to whether "this thing" was flying rock groups or importing marijuana or distributing marijuana. Fleming neither quoted nor paraphrased any conversation about marijuana while DeMatto was in the room. To the contrary, he concluded his testi-

mony by saying that DeMatto had never told him that he would help with the marijuana undertaking.

In our view, after this careful analysis of the proof, DeMatto's conviction is supported only by suspicion or a ten minute association with the actual conspirators, or both. This is simply not enough and we cannot, in good conscience, affirm the guilty verdict as one which a reasonably minded jury could have reached from the evidence beyond a reasonable doubt.

b. Mark Streeter

[3] The evidence introduced to tie Streeter into the conspiracy consists of the following: (1) that Streeter, along with Dyar, met Fleming at a Memphis airport; (2) that Streeter was in and out of the motel room during the discussions about a marijuana run; and (3) that after Fleming's arrest, Streeter flew to Orlando to discuss with Fleming the alibi given to the police.

Streeter argues that the essence of the discussions

held in Orlando is inadmissible hearsay and that the remaining evidence is insufficient to sustain his conviction. Clearly, the testimony disclosing Streeter's meeting Fleming at the Memphis airport and Streeter's on and off presence in the motel room while others were doing the talking was not enough to connect Streeter with the illegal conspiracy. Causey v. United States, 5 Cir., 1965, 352 F.2d 203. Unfortunately for Streeter, however, his activities did not stop there. A reasonably minded jury could infer from Streeter's trip to Orlando and his own conversation with Fleming that he most assuredly knew of the conspiracy, that his interest in it exceeded that of an uninvolved bystander, and that he had a vital stake in concealing it.

II

Double Jeopardy

[4] Dyar and Streeter contend that the indictment charging both conspiracy to possess with intent to distribute, 28 U.S.C. § 846, and conspiracy to import marijuana, 21 U.S.C. § 963, was duplicitous; that multiple punishments were imposed for a single offense in derogation of their constitutional guarantee against double jeopardy. Dyar views the indictment, charging conspiracy to import and to possess marijuana, as an attempt to expand a single conspiratorial agreement embracing dual illegal objectives into multiple conspiracies. Using a slightly different phrasing, Streeter claims that he was indicted for two offenses which arose out of the same transaction.

These arguments are rejected on the authority of United States v. Houltin, 5 Cir., 1976, 525 F.2d 943, 950, vacated on other grounds, sub nom Croucher v. United States, 429 U.S. 1034, 97 S.Ct. 725, 50 L.Ed. 2d 745. See also, United States v. Houltin, 5 Cir., 1977, 553 F.2d 991.

Moreover, the appellants received concurrent sentences on the two counts.

III

Standing

Prior to the trial, Dyar and Streeter moved to suppress the testimony of Fleming because, they say, Fleming's identity was learned through an illegal search of the airplane which landed in Florida. The District Court concluded that the defendants were without standing to raise the challenge. Dyar and Streeter urge that their proprietary interest in the aircraft conferred standing.

It is well settled that the testimony of a witness whose identity has been discovered through an illegal search must be suppressed "unless the government can show: (1) the identity of the witness originated from an independent source; . . . [or] (2) the identity of the witness discovered from the original illegal seizure has become so attenuated as to remove the original taint", United States v. Marder, 5 Cir., 1973, 474 F.2d 1192, 1196.

[5] The decisive factor is whether the complaining individual had a reasonable expectation of privacy in the premises searched or the thing seized. Generally, a defendant will satisfy standing requirements (1) if he has a proprietary or possessory interest in the place searched or the object seized adequate to give rise to a reasonable expectation of privacy, (2) if he was on the premises at the time of the contested search and seizure, or (3) if he is charged with an offense that includes as an essential element, possession of seized evidence. United States v. Hunt, 5 Cir., 1974, 505 F.2d 931, cert. denied, 421 U.S. 975, 95 S.Ct. 1974, 44 L.Ed.2d. 466 (1975); Accord, Brown v. United States, 411 U. S. 223, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973); Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L. Ed.2d 697 (1960).

Dyar maintains that his accompanying Pagels and Fleming to Jackson to rent the aircraft and his payment for fuel at Bekin Airport in Mobile adequately demonstrates his proprietary interest in the airplane. Streeter points to the presence of his name on the lease of the plane, although he was not there and did

not sign the instrument, to indicate his property interest.

[6] Traditional or common law theories of property rights do not automatically confer standing to challenge a search. Property rights in absence of reasonable expectations of privacy in property cannot support a Fourth Amendment claim, United States v. Hunt, supra. Ownership or a leasehold interest must be accompanied by a cognizable privacy interest in the place or thing searched, United States v. Nunn, 5 Cir., 1976, 525 F.2d 958 (ownership); United States v. McConnell, 5 Cir., 1974, 500 F.2d 347 (lease), cert. denied, 420 U.S. 946, 95 S.Ct. 1327, 43 L. Ed.2d 424 (1975). In United States v. Nunn, supra, we held that a defendant who owned, but who was not driving, a truck when it was seized had no reasonable expectation of privacy and lacked standing to challenge search and seizure of the truck. The facts of United States v. McConnell, supra, differ slightly.

There the defendant, who paid for the lease of a vehicle which was in the possession of a codefendant, and not of the defendant, when the search occurred, had no expectation of privacy and lacked standing to object to the legality of the search.

[7] Even if we were to assume that Streeter and Dyar had a leasehold interest in the searched aircraft sufficient to create a traditional property right, when they gave possession to Fleming they abandoned any expectation of personal privacy in the aircraft. See, United States v. Mendoza, 5 Cir., 1972, 473 F.2d 692. Streeter and Dyar, therefore, lacked standing to contest the legality of the search.

[8] Not only did Streeter and Dyar fail to satisfy the reasonable expectation of privacy requirements for the Fourth Amendment test of standing, they were not victims of a search or the ones against whom the search was directed. They were merely persons claiming prejudice through the introduction of damaging evidence gathered as a consequence of a search

directed at someone else, Alderman v. United States, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969); Jones v. United States, supra. "[C]o-defendants and co-conspirators may not assert the Fourt Amendment rights of their alleged partners in crime solely on the basis of their interpersonal association", United States v. Hunt, supra, 505 F.2d at 939.

The convictions of Dyar and Streeter are AFFIRMED.

DeMatto's conviction is REVERSED. As to him, the case is remanded for the entry of a judgment of acquittal.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 77-5481

D.C. Docket No. 77-45-CR-J-T

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

VANCY DYAR, MARK M. STREETER and CLEMENT J. DeMATTO,
Defendants-Appellants.

Appeals from the United States District Court for the Middle District of Florida

Before TUTTLE, COLEMAN and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here

ordered and adjudged by this Court that the convictions of appellants Dyar and Streeter are affirmed; the conviction of appellant DeMatto is reversed, and this cause be, and the same is hereby remanded as to appellant DeMatto to the said District Court in accordance with the opinion of this Court.

June 16, 1978

ISSUED AS MANDATE:

FOR THE FIFTH CIRCUIT

No. 77-5481

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

VANCE DYAR, MARK M. STREETER,
and CLEMENT J. DeMATTO,
Defendants-Appellants.

Appeals from the United States District Court for the Middle District of Florida

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ON PETITIONS FOR REHEARING

(August 9, 1978)

Before TUTTLE, COLEMAN and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby DENIED.

ENTERED FOR THE COURT:

/S/ Jas. P. Coleman
United States Circuit Judge

Supreme Court, U. S.
FILED
OCT 28 1978
MICHAEL RODAK, JR., CLERK

Nos. 78-382 and 78-390

In the Supreme Court of the United States

OCTOBER TERM, 1978

MARK M. STREETER, PETITIONER

v.

UNITED STATES OF AMERICA

VANCE C. DYAR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-382

MARK M. STREETER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 78-390

VANCE C. DYAR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 21-46)[1] is reported at 574 F.2d 1385.

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[1] "Pet. App." refers to the appendix to the petition in No. 78-382.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1978 (Pet. App. 47-48). Petitions for rehearing were denied on August 9, 1978 (Pet. App. 49). The petition for a writ of certiorari in No. 78-382 was filed on September 5, 1978, and in No. 78-390 on September 7, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners' convictions for violating two conspiracy statutes, where the government's proof showed only one agreement to engage in conspiracy, violated double jeopardy.

2. Whether the evidence was sufficient to support petitioner Streeter's convictions.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioners were convicted of conspiring to import marijuana, in violation of 21 U.S.C. 952(a) and 963 (Count I), and conspiring to possess marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 846 (Count II).[2] Streeter was sentenced to the maximum punishment authorized by law on each count, subject to modification under 18 U.S.C. 4205(c), the

[2] Co-defendant Clement DeMatto was also convicted on both conspiracy counts, but his convictions were reversed by the court of appeals (Pet. App. 47-48).

sentences to be served concurrently.[3] Dyar was sentenced to concurrent terms of four years' imprisonment and two years' special parole on each count. The court of appeals affirmed (Pet. App. 21-46).

The evidence adduced at trial, as set forth by the court below (Pet. App. 27-33), showed that in August 1975, petitioner Dyar telephoned Robert Fleming (who became a government witness) in Florida to ascertain whether Fleming would pilot airplanes transporting music groups and their equipment. The next day Fleming flew to Memphis, where he was met at the airport by Dyar and Streeter and taken to a motel. There Fleming discussed with Dyar and Gary Pagels (another co-conspirator) the possibility of organizing a company to transport music groups and hunting expeditions. Soon, the discussion turned to the subject of importing a shipment of marijuana from Colombia, South America. Fleming agreed to join the operation. During the marijuana discussions Streeter was in and out of the room.

After leasing the necessary aircraft and eventually assuring its airworthiness, Fleming and co-pilot Neal Perks flew to Colombia. A day and a half later, they returned to Florida, but no evidence was offered as to whether they brought back any marijuana.

Two days passed and then Fleming's wife telephoned him at work to inform him that police officers

[3] No final sentence has yet been imposed, Streeter having elected not to begin serving his sentence. See *Corey* v. *United States*, 375 U.S. 169, 174-175 n.15 (1963).

were on their way to arrest him. Fleming notified Pagels of his impending arrest. After making bond, Fleming again spoke to Pagels and was told that Streeter would fly to Orlando to discuss future strategy. When Streeter arrived he asked Fleming to outline what he had told the police so that "we can get our stories together" (Tr. 102). After Fleming related the story he had given the police, Streeter replied, "Okay. That is the story we will go with" (Tr. 103).

ARGUMENT

1. Petitioners contend that it was improper to convict them of conspiring to import marijuana and also of conspiring to possess marijuana with intent to distribute when the government proved only a single conspiratorial agreement (78-382 Pet. 9-10; 78-390 Pet. 8-9).

As petitioner Dyar correctly points out (78-390 Pet. 9-10), the courts of appeals are in conflict on this issue. Two circuits agree with petitioners that evidence showing only one agreement to commit related offenses cannot sustain two convictions under different conspiracy statutes. *United States* v. *Rivera Diaz*, 538 F.2d 461 (1st Cir. 1976); *United States* v. *Honneus*, 508 F.2d 566 (1st Cir. 1974), cert. denied, 421 U.S. 948 (1975); *United States* v. *Adcock*, 487 F.2d 637 (6th Cir. 1973). These circuits rely, as do petitioners, on *Braverman* v. *United States*, 317 U.S. 49 (1942), where this Court held that one agreement to commit several unlawful acts did not amount to

several conspiracies under the general conspiracy statute (now 18 U.S.C. 371), because "[t]he single agreement is the prohibited conspiracy, and however diverse its objects it violates but a single statute [Section 371]" (317 U.S. at 54).

Three other circuits, on the other hand, have held that a single agreement may be punished under both Sections 963 and 846. *United States* v. *Warholic*, No. 76-1206 (9th Cir. Dec. 10, 1976) (unpublished), cert. denied, 431 U.S. 905 (1977); *United States* v. *Arteaga-Limones*, 529 F.2d 1183, 1194 (5th Cir.), cert. denied, 429 U.S. 920 (1976); *United States* v. *Houltin*, 525 F.2d 943, 950-951 (5th Cir. 1976), vacated and remanded, 429 U.S. 1034 (1977); *United States* v. *Marotta*, 518 F.2d 681, 684-685 (9th Cir. 1975); *United States* v. *James*, 494 F.2d 1007, 1025-1026 (D.C. Cir.), cert. denied, 419 U.S. 1020 (1974). These decisions rely on *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946). In that case the defendants were convicted of conspiracy to restrain trade, in violation of Section 1 of the Sherman Act, and conspiracy to monopolize, in violation of Section 2, and the Court rejected the argument that *Braverman* barred two convictions for what defendants claimed was "but one conspiracy, namely, a conspiracy to fix prices" (328 U.S. at 788). It was held that a single agreement with several unlawful objects might amount to more than one conspiracy if different elements of the agreement violate different conspiracy statutes: "In contrast to the single conspiracy described in [*Braverman*] in separate counts, all charged under the general con-

spiracy statute [18 U.S.C. 371], we have here separate statutory offenses, one a conspiracy in restraint of trade that may stop short of monopoly, and the other a conspiracy to monopolize that may not be content with restraint short of monopoly. One is made criminal by § 1 and the other by § 2 of the Sherman Act" (*ibid.*).

In our view, the court below—like the courts of appeals for the Ninth and District of Columbia Circuits—is correct in reading *American Tobacco* as controlling in the present situation. But, in any event, this case is not an appropriate vehicle for resolving the conflict among the circuits. Because both petitioners received concurrent prison and parole sentences,[4] the propriety of their conviction on both counts is of academic interest only. In these circumstances, we submit it would be appropriate for the Court to apply the concurrent sentence doctrine and decline to reach petitioners' claims. See *Andresen* v. *Maryland*, 427 U.S. 463, 469 n.4 (1976); *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973).[5]

[4] We assume that, following the study provided for in 18 U.S.C. 4205(c), petitioner Streeter will receive the same sentence on both counts and that the sentences will remain fully concurrent. That result is indicated both by the present tentative sentence and by the district court's treatment of petitioner Dyar.

[5] Invocation of the concurrent sentence doctrine under these circumstances would not conflict with our response in *Rubin* v. *United States*, vacated and remanded, No. 77-792 (Oct. 2, 1978). In *Rubin*, we concluded that the court of appeals improperly utilized the concurrent sentence doctrine because petitioner's claims related to his guilt or innocence on the unreviewed convictions and it was readily apparent that the unreviewed convictions probably would adversely affect petitioner's chances of early parole. That is not the present case. Here, petitioner's double jeopardy claim is unrelated to their guilt or innocence: they do not controvert the evidence of the conduct that formed the basis of their convictions. The fact that two convictions are recorded for their conduct established at trial will not have a practical effect on their term of incarceration. As noted in our response in *Rubin*, the Parole Commission, in assigning an offense severity rating, looks to the actual conduct underlying the offense or offenses, not to the statutory definition of the offense or the number of separate charges.

2. Petitioner Streeter's additional contention (78-382 Pet. 15-20) that the evidence was insufficient to establish his complicity in the conspiracy prior to its termination is without merit. As the court of appeals pointed out (Pet. App. 39-40), Streeter's presence during portions of the discussions concerning the marijuana shipment, coupled with the evidence of his trip to Orlando to interview Fleming following his arrest, clearly supports the inference that Streeter was a knowing participant in the conspiracy.

Petitioner Streeter argues that the fact of his trip to Orlando and the statements he made during his talk with Fleming on that occasion are irrelevant because these events occurred after the conspiracy had terminated. But Streeter's conduct and statements were, in effect, admissions of his own illegal conduct, not statements of co-conspirators. The situation is thus unlike *United States* v. *Killian*, 524 F.2d 1268 (5th Cir. 1975), certiorari denied, 425 U.S. 935

(1976), upon which Streeter relies. Accordingly, even though made subsequent to the termination of the conspiracy, Streeter's admissions were relevant to his prior complicity.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1978

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